

§ 521(2)
Statement of Intent
Relief from stay

In re Steven and Rhonda Schafer

697-63752-fra7

10/27/97

FRA

Unpublished

Debtors owned a 1993 Nissan which was security for Key Bank of Oregon. The vehicle was valued at between \$11,250 and \$13,000 at the petition date and the debt to Key Bank was \$10,968. The debtors were not in default on the loan to Key Bank and were current on payments. In their Statement of Intent, debtors stated that they planned to keep the vehicle, but not redeem or reaffirm the debt.

Key Bank filed a motion for relief from stay or, in the alternative, requiring the debtors to either reaffirm their obligation or redeem the collateral. As grounds for relief, Key Bank argued that the failure to redeem or reaffirm was a default in itself, even though its contract did not list this as a ground for default.

The court held that § 521(2)(A), which requires that the debtors file a statement of intent, is meant only to provide notice of the debtor's intentions with respect to collateral and does not limit the debtor to the options of redemption, reaffirmation, or surrender. Failure to comply with § 521 does not, by itself, give rise to any rights against the debtor who is not otherwise in default. No cause existed for relief from stay. Requiring the debtors to choose between reaffirmation and redemption is also not appropriate given that § 521 does not limit the debtor to those options.

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8 UNITED STATES BANKRUPTCY COURT
9 FOR THE DISTRICT OF OREGON

10 IN RE)
11 STEVEN J. SCHAFER and) Case No. 697-63752-fra7
12 RHONDA H. SCHAFER,)
13 _____) MEMORANDUM OPINION
14 Debtors.)

14 I. FACTS

15 Debtors own a 1993 Nissan automobile, which is security for
16 a loan from Key Bank of Oregon. At the time of the petition the
17 car had a value between \$11,250 and \$13,000 and the debt to Key
18 Bank was \$10,968.

19 Debtors filed a statement of intent pursuant to Code
20 § 521(2)(A)¹. The statement indicated their intention to retain
21 the collateral, but to neither reaffirm nor redeem it. The
22 parties agree that the Debtors have maintained current payments
23 on the obligation to Key Bank, and are not otherwise in default.
24 Key Bank has moved for an order terminating the automatic stay
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26 ¹ Unless otherwise indicated, all statutory references are
to the Bankruptcy Code, 11 U.S.C. §§ 101 to 1330.

1 with respect to the vehicle, or, in the alternative, requiring
2 the Debtors to either reaffirm their obligation to Key Bank, or
3 redeem the collateral. Debtors wish to retain the collateral
4 without taking either of these steps and assert that they should
5 be permitted to do so as long as they continue to perform under
6 the terms of the contract. This procedure, while not explicitly
7 recognized in the Code, is commonly referred to as
8 "reinstatement", the term that will be used in this memorandum.
9 See In re Boodrow, 126 F.3d 43 (2nd Cir. 1997). Debtors further
10 assert that no cause exists for modifying the automatic stay. 11
11 U.S.C. § 362(d) (1).

12 II. DISCUSSION

13 Congress added § 521(2) (A) to the Bankruptcy Code in 1984.
14 The section provides that

15 (A) Within thirty days after the date of the
16 filing of the petition under chapter 7 of this title or
17 on or before the date of the meeting of creditors,
18 whichever is earlier, or within such additional time as
19 the court, for cause, within such period fixes, the
20 debtor shall file with the clerk a statement of his
21 intention with respect to the retention or surrender of
22 such property and, **if applicable**, specifying that such
23 property is claimed as exempt, that the debtor intends
24 to redeem such property, or that the debtor intends to
25 reaffirm debts secured by such property;
26 [Emphasis added]

There is considerable disagreement between trial and
appellate courts over whether this section limits debtors to the
three options of surrender, reaffirmation, or redemption. See
Lowry Federal Credit Union v. West, 882 F.2d 1543 (10th Cir.
1989) (the direction under § 521 is mandatory, but redemption and

1 reaffirmation are not exclusive; Bankruptcy Court has discretion
2 to permit reinstatement); In re Edwards, 901 F.2d 1383 (7th Cir.
3 1990) (debtor must either redeem collateral or reaffirm debt
4 secured by collateral); In re Belanger, 962 F.2d 345 (4th Cir.
5 1992) (allows reinstatement without redemption or reaffirmation);
6 In re Taylor, 3 F.3d 1512 (11th Cir. 1993) (debtor may not retain
7 collateral without either redeeming the property or reaffirming
8 debt); In re Boodrow, 126 F.3d 43 (2nd Cir. 1997) (permitting
9 reinstatement).

10 After reviewing prior case law, the Court of Appeals for the
11 Second Circuit found in Boodrow that the "plain" language of the
12 statute arguably supported either interpretation. The court went
13 on to hold that § 521 served primarily to require notice to
14 secured creditors, and was not intended to restrict substantive
15 options available to a debtor who wished to retain collateral
16 securing a debt. The court further agreed with the view of the
17 Bankruptcy Court that permitting reinstatement was "most
18 consistent with balancing the 'fresh start' policy underlying the
19 Code and the rights of the ... secured creditors." Boodrow at 51
20 (citing In re Boodrow, 192 B.R. 57, 59 (Bankr. N.D. N.Y. 1996)).
21 The court noted that confining an individual Chapter 7 debtor to
22 the choices of surrender, redemption or reaffirmation would
23 severely interfere with the debtor's ability to obtain a fresh
24 start. Since redemption would require payment of a lump sum to
25 the creditor, it is not a likely option for a Chapter 7 debtor.
26 The only remaining choices would be to reaffirm the debt under

1 whatever new terms the creditor required, or to surrender the
2 property.

3 The Bankruptcy Appellate Panel of the Ninth Circuit has held
4 that the debtor's options may not be limited to redemption or
5 reaffirmation. In re Mayton, 208 B.R. 61 (BAP 9th Cir. 1997).
6 In Mayton the court interprets § 521(2)(A) in light of
7 subparagraph (c), which states: "Nothing in subparagraphs (a) and
8 (b) of this paragraph shall alter the debtor's or the trustee's
9 rights with regard to such property under this Title." The court
10 held that, while § 521(2) directs that a debtor give notice to
11 the secured creditor of his intention, and to put that intention
12 into effect, the section was not intended to undercut the
13 debtor's rights to a stay under § 362, or to give the secured
14 creditor any greater, or debtor any fewer, rights than as existed
15 between the parties prior to the bankruptcy. "In light of the
16 preservation of or continued existence of the debtor's rights in
17 these respects, the only logical basis for reconciling the
18 conflicting elements of § 521(2) is to hold that it is
19 essentially a notice statute." Id. at 67.

20 I agree with the reasoning and conclusions of the courts in
21 Boodrow and Mayton. The purpose of Code § 521(2) is to require
22 the debtor to give early notice to secured creditors of what they
23 can expect with respect to their collateral, and to provide them
24 with a remedy if the debtor states an intention to reaffirm,
25 redeem, or surrender, and thereafter fails or refuses to do so.
26 However, the statute does not operate to extinguish other options

1 permitted by state law or the parties' contract.

2 Key Bank seeks relief from the automatic stay under Code
3 § 362. When queried about what remedy Key Bank would pursue in
4 State Court if the motion were allowed, counsel asserted that the
5 failure to redeem or reaffirm in and of itself constituted a
6 default under the parties' contract. However, the contract
7 itself contains no terms to that effect. Failure to comply with
8 Code § 521 does not, by itself, give rise to any rights against
9 the debtor who is otherwise not in default. Lowry Federal Credit
10 Union v. West, 882 F.2d at 1546 (10th Cir. 1989). It is conceded
11 that the Debtors have equity in the vehicle. No cause exists
12 under Code § 362(d)(1) to modify the stay.

13 In the alternative Key Bank asks that the Debtors be
14 required to elect between redemption of the collateral or
15 reaffirmation of the underlying debt. Since those options are
16 not exclusive, and the purpose of Code § 521 is primarily to give
17 notice of intention, such relief would be inappropriate.

18 An order consistent with the foregoing will be entered.
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21 FRANK R. ALLEY, III
22 Bankruptcy Judge
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